

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Sudeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

East Kentucky Power Cooperative, Inc.

Docket No. NJ07-1-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER, SUBJECT
TO MODIFICATIONS

(Issued March 28, 2007)

1. On November 14, 2006, East Kentucky Power Cooperative, Inc. (EKPC) filed a petition for a declaratory order requesting a finding that its updated open access transmission tariff (OATT) continues to constitute an acceptable reciprocity tariff pursuant to the provisions of Order No. 888.¹ EKPC also requests waiver of the filing fee.
2. In this order, we grant the petition for a declaratory order, on the condition that EKPC make certain tariff modifications, as discussed below. We also grant EKPC's request for a waiver of the filing fee as discussed below.

¹ *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, FERC Stats. & Regs. ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

Background

3. EKPC is an electric generation and transmission cooperative that provides electric energy to its member-owner distribution cooperatives in central and eastern Kentucky. According to the application, EKPC supplies its sixteen member distribution cooperatives (Members) the electric power and energy required to serve their respective retail electric customers through base load generating plants, peaking units, hydro power and more than 2,800 miles of transmission lines. EKPC and each of its Members are not-for-profit organizations that are obligated to provide electric service at the lowest cost reasonably possible. EKPC and each of its Members are not “public utilities” subject to the FERC’s jurisdiction.

4. On July 14, 1997, in Docket No. NJ97-14-000, EKPC filed its OATT with the Commission, requesting a declaratory order that the OATT satisfied the Commission’s comparability standards and was therefore an acceptable reciprocity tariff pursuant to the provisions of Order No. 888. The Commission issued a letter order granting EKPC’s request on December 18, 1997. Until September 2006, EKPC did not have any customers taking network service under the reciprocity tariff.

5. Following the termination of an interconnection agreement between EKPC and Kentucky Utilities Company (KU) on August 31, 2006, under which EKPC provided KU with transmission service to serve the KU loads located on the EKPC system, EKPC began serving Louisville Gas & Electric Company (LG&E) and KU² under its reciprocity tariff. On September 1, 2006, EKPC posted on its OASIS its changed network integration transmission service (NITS) rate, reflecting the adoption of the stated rate of \$1.62/kW-month for NITS in lieu of the load-ratio share provision, effective on and after September 1, 2006. EKPC also notified its only reciprocity tariff customer, LG&E/KU, of that change, on August 31, 2006. The stated rate of \$1.62/kW-month is based on the annual transmission revenue requirement originally set forth in Attachment H to EKPC’s reciprocity tariff, and equals the monthly rate for firm point-to-point service.

6. EKPC states that the purpose of the instant filing is to notify the Commission of the change to the NITS rate, and other changes EKPC has made to its reciprocity tariff to reflect Commission and Kentucky policies that have been put into place since EKPC first

² Both LG&E and KU are wholly-owned subsidiaries of E.ON U.S. LLC (E.ON), which in turn is a subsidiary of E.ON AG, a multi-national energy company headquartered in Germany. Both LG&E and KU provide retail electric service to customers located in Kentucky. KU also sells wholesale electric energy to municipalities in Kentucky.

filed its reciprocity tariff, and to update the filed reciprocity tariff to incorporate these changes.

EKPC's Reciprocity Tariff

7. EKPC submits a petition for declaratory order requesting a finding that its updated OATT continues to constitute a reciprocity tariff and requests waiver of the Commission's filing fee based on its non-jurisdictional status. In particular, EKPC explains that it has updated its reciprocity tariff to: (1) utilize a stated rate for NITS rather than a rate based on the customer's load ratio share; (2) incorporate modifications reflecting an order of the Kentucky Public Service Commission (KPSC) requiring Kentucky utilities to revise their curtailment policies to establish a preference for native load; (3) incorporate the *pro forma* Large Generator Interconnection Procedures (LGIP), Large Generator Interconnection Agreement (LGIA), Small Generator Interconnection Procedures (SGIP) and Small Generator Interconnection Agreement (SGIA), consistent with Order Nos. 2003³ and 2006;⁴ (4) redesignate its reciprocity tariff sheets in accordance with the requirements of Order No. 614;⁵ and (5) reflect the replacement of East Central Area Reliability Coordination Agreement Council (ECAR) with SERC Reliability Corporation (formerly Southeastern Electric Reliability Council) as the applicable regional reliability organization.

³ *Standardization of Generator Interconnection Agreements and Procedures*, Order No. 2003, FERC Stats. & Regs. ¶ 31,146 (2003), *order on reh'g*, Order No. 2003-A, FERC Stats. & Regs. ¶ 31,160 (2004), *order on reh'g*, Order No. 2003-B, FERC Stats. & Regs. ¶ 31,171, *order on reh'g*, Order No. 2003-C, FERC Stats. & Regs. ¶ 31,190 (2005), *affirmed sub nom. Nat'l Ass'n of Regulatory Util. Comm'rs v. FERC*, No. 04-1148, 2007 U.S. App. LEXIS 626 (D.C. Cir. Jan. 12, 2007).

⁴ *Standardization of Small Generator Interconnection Agreements and Procedures*, Order No. 2006, FERC Stats. & Regs. ¶ 31,180, *order on reh'g*, Order No. 2006-A, FERC Stats. & Regs. ¶ 31,196 (2005), *clarified*, Order No. 2006-B, FERC Stats. & Regs. ¶ 31,221 (2006), *appeal pending sub nom. Consolidated Edison Co. of New York, Inc., et al. v. FERC*, (U.S.C.A., D.C. Circuit, Docket Nos. 06-1018, *et al.*).

⁵ *Designation of Electric Rate Schedule Sheets*, Order No. 614, FERC Stats. & Regs., ¶ 31,096 (2000).

Notices and Interventions

8. Notice of the filing was published in the *Federal Register*, 71 Fed Reg. 69,206 (2006), with comments, protests, or motions to intervene due on or before December 12, 2006.

9. E.ON, on behalf of its public utility subsidiaries LG&E and KU, filed a timely motion to intervene, protest, and request for hearing on December 12, 2006. EKPC filed its answer to E.ON's protest on December 29, 2006. E.ON filed an answer to EKPC's answer on January 12, 2007. The National Rural Electric Cooperative Association (NRECA) filed a motion to intervene out-of-time and comments on January 22, 2007, to which E.ON filed an answer on January 26, 2007. E.ON states that, with FPA section 211(a) issues removed from this proceeding, NRECA no longer has a substantial interest in these proceedings and its motion to intervene out-of-time should be denied. On February 2, 2007, EKPC filed an answer to E.ON's request for settlement proceedings, to which E.ON filed its answer on February 5, 2007.

Discussion

Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2006), the timely, unopposed motion to intervene of E.ON serves to make it a party to this proceeding. In addition, we will grant NRECA's motion to intervene out-of-time, given its interest in the proceeding, the stage of this proceeding, and the absence of undue delay or prejudice.

11. The Commission rejects E.ON's request that we deny NRECA's motion to intervene as NRECA represents an interest that may be directly affected by our decision.

12. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2006), prohibits an answer to an answer or protest unless otherwise ordered by the decisional authority. We are not persuaded to accept EKPC's February 2, 2007 and E.ON's February 5, 2007 answers, or E.ON's January 12, 2007 answer. However, because EKPC's December 29, 2006 answer and E.ON's January 26, 2007 answer have provided information that assisted us in our decision-making process, the Commission accepts these answers.

Reciprocity – Safe Harbor Status

13. In Order No. 888, the Commission established a safe harbor procedure for the filing of reciprocity tariffs by non-public utilities.⁶ Under this procedure, non-public utilities may voluntarily submit to the Commission a reciprocity tariff and a petition for declaratory order requesting a finding that the reciprocity tariff meets the Commission's comparability (non-discrimination) standards. If the Commission finds that such a reciprocity tariff contains terms and conditions that substantially conform or are superior to those in the *pro forma* tariff contained in Order No. 888, the Commission will deem it to be an acceptable reciprocity tariff and will require public utilities to provide open access transmission service upon request to that particular non-public utility.⁷

Non-Rate Terms and Conditions

14. We have compared the non-rate terms and conditions of EKPC's updated reciprocity tariff to those in the Commission's *pro forma* tariff. We find that the proposed non-rate terms and conditions of EKPC's reciprocity tariff continue to generally meet the requirements of the *pro forma* tariff.

15. EKPC has generally adopted the *pro forma* non-rate tariff terms and conditions and we find that the majority of the proposed non-rate terms and conditions of EKPC's reciprocity tariff substantially conform or are superior to the *pro forma* tariff.⁸

⁶ Order No. 888, FERC Stats. & Regs. ¶ 31,036 at 31,760; Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,281-87.

⁷ In Order No. 888-A, the Commission clarified that, under the reciprocity condition, a non-public utility must also comply with the OASIS and standards of conduct requirements or obtain waiver of them. *See* Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,286.

⁸ We note, however, that the Commission recently reformed the *pro forma* OATT in Order No. 890, clarifying and expanding the obligations of transmission providers to ensure that transmission service is provided on a non-discriminatory basis. *See Preventing Undue Discrimination and Preference in Transmission Service*, Order No. 890, 72 Fed. Reg. 12,266, 12,294 (March 15, 2007). If it wishes to continue to qualify for safe harbor treatment after the effective date of Order No. 890, which is May 14, 2007, a non-public utility that already has a safe harbor OATT (e.g., EKPC) must amend its OATT so that its provisions substantially conform or are superior to the reformed *pro* (continued)

16. However, we find that to comply fully with the *pro forma* tariff, EKPC must revise certain aspects of its reciprocity tariff which deviate from the *pro forma* tariff. First, EKPC is missing several provisions from its reciprocity tariff, which are a part of the *pro forma* tariff. For its LGIP, EKPC lacks the following: (1) “Assumptions Used in Conducting the Interconnection System Impact Study,” which is “Attachment A to Appendix 3, Interconnection System Impact Study Agreement,” (2) “Appendix 4, Interconnection Facilities Study Agreement,” and (3) “Attachment A to Appendix 4, Interconnection Facilities Study Agreement, Interconnection Customer Schedule Election for Conducting the Interconnection Facilities Study.” EKPC has not provided an explanation as to why these provisions were not a part of its reciprocity tariff, in keeping with the *pro forma* tariff.

17. Because EKPC has not shown that the changes to its reciprocity tariff substantially conform or are superior to the *pro forma* tariff, the Commission will condition its reciprocity finding on EKPC conforming these provisions to the *pro forma* tariff or providing a sufficient explanation as to why they are unnecessary for meeting the standard.

18. We also note that in the SGIP, sections 2.2.4 to 2.4 are repeated in Sheet Nos. 319 and 320 of the redlined reciprocity tariff and Sheet Nos. 329 and 330 of the clean reciprocity tariff, creating confusion as to which sections are intended to become a part of EKPC’s reciprocity tariff. We will require EKPC to revise these reciprocity tariff sheets to conform with the *pro forma* tariff.

19. Finally, we note that there are instances of misnumbering and repetition in the SGIA that render the section “Assignment, Liability, Indemnity, Force Majeure, Consequential Damages, and Default” confusing in Articles 7 and 8 on Sheet Nos. 393 through 395 of the redlined reciprocity tariff and Sheet Nos. 406 through 408 of the clean reciprocity tariff. We will require EKPC to revise these reciprocity tariff sheets to conform with the *pro forma* tariff.

Rates

20. We have previously explained that the review standard for reciprocity tariff rates is that the non-public utility must provide sufficient information for us to conclude that its

forma OATT adopted in Order No. 890. The specific requirements of Order No. 890, and the mechanisms for compliance, are set forth therein.

rates are comparable to the rates that it charges itself.⁹ EKPC's proposed rates would be applicable to all of its customers, including its sixteen member cooperatives.

21. E.ON argues that EKPC has not met its burden of showing that the NITS rate is comparable to what EKPC charges itself for network service and asserts that the cost support provided by EKPC is outdated and may be inaccurate. E.ON claims that EKPC has not shown why a change from a formula rate to a stated rate is necessary to maintain the comparability between the rates and contends that these issues cannot be resolved on the record currently before the Commission. E.ON requests that the Commission set for hearing the issue of whether EKPC is offering transmission service at rates that are comparable to what EKPC charges itself.

22. EKPC states that E.ON has failed to demonstrate that a hearing is warranted. EKPC states that it has identified the transmission component of the rates charged to its members and has ample documentation supporting how the rate was calculated. Additionally, EKPC states that not only is the rate comparable, but it is lower than the rate EKPC charges itself. Finally, EKPC states that it is not required to demonstrate that a change from a formula rate to a stated rate is necessary to maintain comparability.

23. NRECA states that EKPC has fully met its burden to establish that its reciprocity tariff, as amended, continues to be an acceptable reciprocity tariff and the Commission therefore, should dismiss E.ON's protest.

24. We reject E.ON's arguments that a hearing is necessary. EKPC has provided sufficient information for us to conclude that EKPC's revised rates are comparable to the rates it charges itself. Accordingly, we find that the proposed rates meet the standard for a reciprocity tariff.

Compliance with Kentucky State Law

25. EKPC modified its reciprocity tariff covering retail electric service to reflect the requirements, under Kentucky state law, that Kentucky utilities revise their curtailment policies to establish a preference for native load. Kentucky Revised Statute section 278.214 states:

⁹ See, e.g., *Long Island Power Authority*, 84 FERC ¶ 61,280, at 62,333 (1998); *Salt River Project Agricultural Improvement and Power District*, 83 FERC ¶ 61,280, at 62,162 (1998).

When a utility or generation and transmission cooperative engaged in the transmission of electricity experiences on its transmission facilities an emergency or other event that necessitates a curtailment or interruption of service, the utility or generation and transmission cooperative shall not curtail or interrupt retail electric service within its certified territory, or curtail or interrupt wholesale electric energy furnished to a member distribution cooperative for retail electric service within the cooperative's certified territory, except for customers who have agreed to receive interruptible service, until after service has been interrupted to all other customers whose interruption may relieve the emergency or other event.¹⁰

EKPC made conforming modifications to the preamble to section III and to sections 13.6, 14.7, 28.3, 33.2, 33.5, and 33.7 of the reciprocity tariff. The statute, however, was later struck down as unconstitutional by a federal court in *Kentucky Power Co. v. Huelsmann*.¹¹ Because EKPC's curtailment provisions have been modified pursuant to a law which is no longer valid, we will require EKPC to revise its reciprocity tariff sheets to conform with the decision in *Huelsmann*.

Filing Fee

26. We will grant EKPC's request for waiver of the filing fee. As we stated in Order No. 888-A, "[the Commission's] regulations specifically exempt states, municipalities, and anyone who is engaged in the official business of the Federal Government from filing fees. Because of the nature of the safe harbor and waiver provisions, we will also waive the filing fee for declaratory orders for all other non-public utilities in those circumstances."¹²

¹⁰ Ky. Rev. Stat. Ann. § 278.214 (2004).

¹¹ 352 F.Supp. 2d 777 (E.D. Ky. 2005). The court in *Huelsmann* found that section 278.214 is "unconstitutional as it violates the dormant Commerce Clause to the [] Constitution." *Id.* at 787. The court reasoned that the statute "discriminates against similarly situated out-of-state interests," giving "Kentucky residents a preferred right of access to transmission service in the event of a temporary scarcity of that service" which the "Commerce Clause does not allow." *Id.* at 786-87.

¹² Order No. 888-A, FERC Stats. & Regs. ¶ 31,048 at 30,288-89.

The Commission orders:

(A) EKPC's petition for declaratory order is hereby granted, and its updated reciprocity tariff is deemed to represent an acceptable reciprocity tariff, on the condition that it revise its reciprocity tariff, consistent with the discussion in the body of this order.

(B) EKPC's request for waiver of the filing fee is hereby granted.

By the Commission.

(S E A L)

Philis J. Posey,
Acting Secretary.